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***CO-LEAD CLASS COUNSEL***

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on signature page*

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

FELTON A. SPEARS, JR. and  
SIDNEY SCHOLL, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

VS.

FIRST AMERICAN EAPPRAISEIT  
(a/k/a eAppraiseIT, LLC),  
a Delaware limited liability company,

Defendant.

Case No. 5-08-CV-00868 (RMW)

**NOTICE OF MOTION AND  
PLAINTIFF'S MOTION *IN LIMINE*  
No. 18 - TO EXCLUDE DEFENDANT'S  
WITNESSES FROM THE  
COURTROOM**

**Honorable Ronald M. Whyte**

Date: October 16, 2014

Time: 2:00 p.m.

Place: Courtroom 6, 4th Floor

280 South 1st Street

San Jose, CA 95113

1 **NOTICE OF MOTION AND MOTION**

2 TO DEFENDANT AND ITS COUNSEL OF RECORD IN THIS ACTION:

3 PLEASE TAKE NOTICE THAT, on October 16, 2014 at 2:00 p.m., or as soon thereafter as  
4 may be heard by the above-captioned Court located at Courtroom 6, 4th Floor, 280 South 1st Street,  
5 San Jose, CA 95113, before the Honorable Ronald M. Whyte, Plaintiff Felton A. Spears, Jr. will, and  
6 hereby does, move *in limine* for an Order precluding Defendant First American eAppraiseIT's  
7 ("Defendant" or "EA") witnesses from the courtroom, and prohibiting Defendant's expert witnesses  
8 from reviewing transcripts of the proceedings.<sup>1</sup>

9 **I. INTRODUCTION AND MATERIAL FACTS**

10 Plaintiff Felton A. Spears, Jr. moves *in limine* to exclude defendant's witnesses from the  
11 courtroom under Federal Rule of Evidence 615.

12 As the court is aware, Plaintiff's claim is for a violation of § 8(a) of the Real Estate Settlement  
13 Procedures Act ("RESPA"), 12 U.S.C. § 2607(a), which prohibits giving or accepting anything of  
14 value pursuant to an agreement or understanding to refer settlement services to any person. 12 U.S.C.  
15 § 2607(a). Plaintiff alleges Defendant eAppraiseIT LLC ("EA") and Washington Mutual Bank, F.A.  
16 ("WMB") entered into an agreement or understanding for EA to provide WMB with inflated appraisals  
17 when and where it was needed to justify a loan WMB wanted to make. Second Amended Complaint  
18 ¶¶ 6-7, 37-40, 90, Dkt. No. 149.

19 **II. ARGUMENT**

20 Federal Rule of Evidence 615 provides that a court "must order witnesses excluded so that they  
21 cannot hear other witnesses' testimony" if a party requests it. Fed. R. Evid. 615. That rule includes  
22 four exceptions, but only one should apply to Defendant here. *See* Fed. R. Evid. 615(b) (stating that  
23 court may not exclude designative representative employees or officers). Exclusion of all of  
24 Defendant's witnesses except for Defendant's representative is appropriate because this case will  
25 involve a lengthy give and take between expert and other witnesses during which those witnesses  
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27 <sup>1</sup> Plaintiff asks the court to exclude the witnesses Defendant identifies in the Joint Pretrial Statement,  
28 Dkt. No. 458, Exh. D.

1 would have the opportunity to tailor or reform their proffered testimony. *See* Fed. R. Evid. 615  
2 Advisory Committee Notes (“The efficacy of excluding or sequestering witnesses has long been  
3 recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.”)<sup>2</sup>

4 With regard to expert witnesses in particular, Plaintiff so moves for the exclusion of  
5 Defendant’s experts for many of the reasons Defendant points out in its Motion *in Limine* No. 11 to  
6 Exclude Plaintiff’s Experts, (Dkt. No. 470), which contains arguments that have equal force when  
7 applied to Defendant’s experts. For example, Defendant’s experts “have prepared detailed written  
8 reports containing a complete statement of their opinions,” and should not “be testifying based on facts  
9 revealed for the first time at trial,” making their presence “not essential to the presentation of  
10 [Defendant’s] case.” (*Id.* at 2). In addition, proving the RESPA claim will involve a “classic battle of  
11 the experts[,]” Dkt. No. 438 at 18, which makes exclusion of experts appropriate here.

12 If Defendant believes that any of its witnesses should not be excluded, Defendant must  
13 adequately explain why. *See United States v. Seschillie*, 310 F.3d 1208, 1212-13 (9th Cir. 2002)  
14 (stating that “the ‘essential nature’ of a witnesses’ presence must ‘be shown by [the] party’” opposing  
15 sequestration) (quoting Fed. R. Evid. 615(3)).

### 16 17 **III. CONCLUSION**

18 For the reasons stated above, Plaintiff respectfully requests that the Court exclude Defendant’s  
19 witnesses from the courtroom during the presentation of Defendant’s case. Given that Defendant has  
20 similarly moved, Plaintiff is hopeful that both parties’ requests can be accommodated.

21 Dated: October 2, 2014  
22  
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27 <sup>2</sup> Plaintiff agrees with Defendant that both parties’ experts should be allowed in the courtroom  
28 during the presentation of the opposing party’s case.

**FEINSTEIN DOYLE PAYNE & KRAVEC, KELLER ROHRBACK L.L.P.  
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***Trial Counsel for Plaintiff and the Class***

1 **PROOF OF SERVICE**

2 STATE OF WASHINGTON )  
3 ) ss.:  
4 COUNTY OF KING )

5 I am employed in the County of King, State of Washington. I am over the age of 18 and not a  
6 party to the within action. My business address is 1201 Third Avenue, Suite 3200, Seattle, WA 98101.

7 On October 2, 2014, using the Northern District of California's Electronic Case Filing System,  
8 with the ECF ID registered to Gretchen Freeman Cappio, I filed and served the document(s) described  
9 as:

10 **NOTICE OF MOTION AND PLAINTIFF'S MOTION *IN LIMINE* No. 18 - TO EXCLUDE**  
11 **DEFENDANT'S WITNESSES FROM THE COURTROOM**

12 **[X] BY ELECTRONIC TRANSMISSION USING THE COURT'S ECF SYSTEM:** I  
13 caused the above document(s) to be transmitted by electronic mail to those ECF registered  
14 parties listed on the Notice of Electronic Filing (NEF) pursuant to Fed.R.Civ.P. 5(d)(1) and  
15 by first class mail to those non-ECF registered parties listed on the Notice of Electronic  
16 Filing (NEF). *"A Notice of Electronic Filing (NEF) is generated automatically by the ECF  
17 system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail  
18 address of record in the case, shall constitute the proof of service as required by  
19 Fed.R.Civ.P. 5(d)(1). A copy of the NEF shall be attached to any document served in the  
20 traditional manner upon any party appearing pro se."*

21 I declare that I am admitted *pro hac vice* in this action.

22 I declare under penalty of perjury under the laws of the United States that the above is true and  
23 correct.

24 Executed on October 2, 2014, at Seattle, Washington.

25 /s/Gretchen Freeman Cappio

26 Gretchen Freeman Cappio